

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LEROY BRANCH</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,588
<b>VAUGHAN MECHANICAL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>BUILDER'S ASSN. SELF-INSURERS' FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant's former counsel, Frank D. Taff, appeals from an Order entered by Administrative Law Judge Bryce D. Benedict on December 2, 1996, relating to attorney fees and costs.

**APPEARANCES**

James B. Biggs of Topeka, Kansas, appeared on the behalf of claimant. Frank D. Taff of Topeka, Kansas, appeared on his own behalf seeking attorney fees as the former counsel for claimant in this case. Both parties have submitted briefs and the case has been placed on the summary docket for disposition without oral argument.

**RECORD**

The Appeals Board has reviewed and considered the transcript of the hearing held November 27, 1996, as well as the petition for attorney fees and a copy of the attorney fee agreement attached to the petition.

### ISSUES

The Administrative Law Judge denied claimant's request for attorney fees and costs. The Administrative Law Judge also assessed cost of the transcript of the hearing against claimant's former counsel. Claimant's former counsel, Mr. Frank D. Taff, now appeals from that ruling and argues that he is entitled to attorney fees on a *quantum meruit* basis even though no recovery was obtained for the claimant in this case.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the preliminary hearing Order by the Administrative Law Judge should be affirmed.

Mr. Taff represented claimant in a workers compensation claim pursuant to a written contract which is attached to the petition for attorney fees. Claimant was injured in Missouri and the Administrative Law Judge found that Kansas did not have jurisdiction. The Appeals Board affirmed that finding and an appeal was filed with the Court of Appeals. While that appeal was pending, claimant terminated Mr. Taff and retained other counsel. Claimant subsequently terminated the second counsel, retained a third counsel, and is pursuing the claim in Missouri.

Mr. Taff argues that he is entitled to attorney fees on a *quantum meruit* basis. The Appeals Board finds no basis for awarding such fees. The attorney fee agreement in this case calls for a contingency fee to be based upon a percentage of the recovery pursuant to K.S.A. 44-536. K.S.A. 44-536 provides in pertinent part:

"(f) All attorney fees for representation of an employee or the employee's dependents shall be only recoverable from compensation actually paid to such employee or dependents, except as specifically provided otherwise in subsection (g) and (h)."

The attorney fee agreement between the claimant and Mr. Taff in this case requires claimant to pay a reasonable amount for the service or a percentage of the recovery, whichever is less. There has been no recovery and claimant's counsel would, therefore, not be entitled to any fee pursuant to the terms of the contract. Cases cited by counsel are not on point because they involve claims where counsels' services were terminated and claimant subsequently recovered benefits. See Lackey v. D & M Trucking 9 Kan. App. 2d 679, 687 P.2d 23 (1984); Madison v. Goodyear Tire & Rubber Co., 8 Kan. App. 2d 575, 663 P.2d 663, (1983).

The Appeals Board notes the record does not reflect the current status of the appeal before the Kansas Court of Appeals. If that appeal were revived and the claim successfully pursued and benefits recovered, counsel might then have a claim for fees.

Claimant's current counsel has asked for assessment of penalties. The Administrative Law Judge did assess the cost of the transcript of the hearing and the Appeals Board finds that it was appropriate to do so both under K.S.A. 44-536 and under the more general provision of K.S.A. 44-555 which authorizes the assessment of court reporter fees to any party to the proceedings. Current counsel's request for additional penalties is denied.

The Appeals Board notes the claimant has acknowledged his obligation to reimburse his former counsel for expenses incurred in prosecution of the claim. The Administrative Law Judge ruled that the request for costs should be denied. While this recovery of the costs would not be through the workers compensation court, the Appeals Board does not, by affirming the order, suggest that the claimant has no obligation to reimburse the costs. The attorney fee agreement clearly states claimant is obligated to pay the costs.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated December 2, 1996, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Biggs, Topeka, KS  
Frank D. Taff, Topeka, KS  
Wade A. Dorothy, Lenexa, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director